

**Matter of McGrath v Kelly**

2009 NY Slip Op 31253(U)

June 10, 2009

Supreme Court, New York County

Docket Number: 113535/08

Judge: Shirley Werner Kornreich

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Index Number : 113535/2008  
**MCGRATH, THOMAS**  
VS.  
**KELLY, RAYMOND**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/26/09  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1, 2, 3, 4  
5, 6  
7

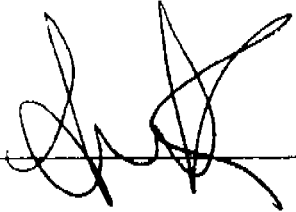
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/10/09

  
\_\_\_\_\_  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
In the Matter of the Application of  
THOMAS MCGRATH,

Petitioner,

Index No.: 113535/08

For Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules,

DECISION  
and ORDER

-against-

RAYMOND KELLY, as the Police Commissioner  
of the City of New York, and as  
Chairman of the Board of Trustees of the  
Police Pension Fund, Article II, THE BOARD  
OF TRUSTEES of the Police Pension Fund,  
Article II, NEW YORK CITY POLICE  
DEPARTMENT and THE CITY OF NEW YORK

Respondents.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

-----X  
KORNREICHH, SHIRLEY WERNER, J.:

Petitioner Thomas McGrath, a retired New York City Police Officer, brings this Article 78 proceeding and seeks a judgment: (1) annulling the decision of respondent Board of Trustees of the Police Pension Fund, Article II (Board of Trustees), which denied his application for accident disability retirement (ADR) benefits, and awarding him an ADR pension retroactive to April 11, 2007; or (2) awarding ADR benefits forthwith; or (3) remanding this matter to respondents with instructions to perform a fair and legally sufficient evaluation of the application; or (4) holding a factual hearing to determine whether petitioner performed forty hours of World Trade Center work. Respondents oppose.

*I. Background*

Petitioner was appointed a police officer with the New York Police Department on July 5, 1989 and retired in January of 2005. Petitioner's actions and whereabouts during the rescue and recovery

efforts after the attacks of September 11, 2001 are in dispute. Petitioner claims he performed hundreds of hours of rescue, recovery, and clean up work at the World Trade Center site and the Staten Island Land Fill. Respondents have been unable to find any record of his duties during this time period.

In March 2002, petitioner presented to the NYPD Psychological Evaluation Unit with "severe and persisting psychological symptoms." Respondents' exhibit 1. On July 2, 2004, the Police Commissioner filed an application for ordinary disability retirement (ODR) on petitioner's behalf. The Medical Board recommended approval of the Police Commissioner's ODR application on October 4, 2004. On December 22, 2004, petitioner filed an application for ADR, which would provide better benefits, alleging that he suffered from posttraumatic stress disorder related to his rescue, recovery, and clean-up efforts at the WTC site. The Medical Board recommended denial of the application, whereupon the Board of Trustees remanded the application back to the Medical Board for further review. The Medical Board again recommended denial of petitioner's application, which recommendation the Board of Trustees followed at their next meeting.

Petitioner filed an Article 78 proceeding challenging the Board of Trustees' decision on January 10, 2006. After passage of the Administrative Code 13-252.1 (WTC Disability Law), petitioner agreed to withdraw the proceeding to allow for reconsideration under the new law. On April 2, 2007, the Medical Board reconsidered its previous decisions and found petitioner psychologically disabled as a result of his WTC efforts. This finding is not in dispute.

Pursuant to the WTC Disability Law, petitioner filed a written and sworn statement provided by the Police Pension Fund stating he worked at the WTC site and the Fresh Kills Landfill. The Board of Trustees tabled petitioner's application nine times in meetings each month from September 2007 through May 2008 while seeking verification that petitioner had worked on WTC sites for the 40 hours required by the WTC Disability Law. During this period, petitioner submitted affidavits from himself, his partner, a supervisor, and a civilian volunteer providing additional details about his WTC work

including approximate dates and hours worked at each site, specific assignment locations, and duties performed. Maria Chachere, a civilian volunteer, identified petitioner as a "member[] of the OCCB [Organized Crime Control Unit] squad." Petitioner's exhibit 26.

Also during this period, petitioner's counsel sent six letters to the Board of Trustees or the Pension Fund Attorney asking the Board to grant an ADR without delay. A November 7, 2007 letter noted that petitioner had made an unsuccessful effort to procure his time records and stated that petitioner believed the records were no longer at their original locations. The same letter directed the Board of Trustees to the Command Logs from Bronx Narcotics and the Rodman's Neck Firing Range. An April 2, 2008 letter protested the delay, arguing that it was the NYPD's and the Pension Fund's duty to maintain and locate employment records. In the same letter, petitioner's counsel requested to appear at the next Board of Trustees' meeting and asked that any discussion of the application be held on the record. Subsequently, in an April 3, 2008 letter, petitioner's counsel repeated the request that all discussion of the application be held on the record and requested a contact person with whom to discuss the application. In an April 29, 2008 letter, petitioner's counsel asked "that the case not be 'tabled' again" and again requested discussion on the record (Petitioner's exhibit R). In a June 9, 2008 letter, petitioner's counsel once more asked that all discussion of the application be held on the record.

At each of the nine meetings, petitioner's application received brief discussion, most often indicating only that the application was being tabled for verification of the forty hours required by the WTC Disability Law. The minutes from September 2007 to May 2008 do not outline the Board of Trustees' verification efforts nor the difficulties, if any, that they encountered.

Petitioner's application came up a tenth time at a June 11, 2008 Board meeting. Ms. Debellis noted that the case had been tabled nine times and that petitioner's counsel had requested that it not be tabled again. She stated that the application would be denied because the Board of Trustees had been unable to find any Police Department documents verifying McGrath's forty hours and asked Sergeant

Boughton and Ms. Marin-Jordan to outline their efforts to find such documents. They reported that the Board of Trustees believed petitioner had been assigned to the Organized Crime Investigative Bureau (OCID) on and in the aftermath of September 11, 2001. Sergeant Boughton stated that he had contacted David Whitehead at the Law Department who had been unable to find any records for OCID. Sergeant Boughton also stated he had an inspector "do command checks to make sure [petitioner] was assigned to OCID that day" (Respondents' exhibit 29), but did not report the result of these command checks. Sergeant Boughton and others searched boxes of detail rosters from Manhattan South for the period from September 2001 through September 2002 without finding petitioner's name, though Sergeant Boughton admitted that, "I can't say we had all of the detail rosters." Respondents' exhibit 29.

Ms. Marin-Jordan reported that she had spoken with Lieutenant Pope, who she believed to be the commanding officer of OCID. Lieutenant Pope had no recollection of petitioner working at OCID and provided roll calls that did not show petitioner working there. He provided an information card, called a "10 card," demonstrating that petitioner had been transferred to SBI, which Ms. Marin-Jordan was informed stood for the South Bronx Initiative, housed in the 50th Detective Squad. Ms. Marin-Jordan spoke with Sgt. Foley of the 50th Detective Squad who had no roll calls from 2001. Ms. Marin-Jordan was provided with a log from OCID showing that petitioner had been transferred at some point to the Training Initiative at Rodman's Neck (TIRS), a unit no longer in existence, and that this assignment was discontinued on October 24, 2001. She spoke with a detective of the Organized Crime Control Unit (OCCB), of which TIRS was a subunit, and learned that it had no roll calls. OCID also provided Ms. Marin-Jordan with lists of personnel who were assigned or voluntarily reported to the World Trade Center, one dated September 24, 2001 and one dated April 2, 2002. Petitioner was not on either list. Ms. Marin-Jordan was unable to contact Retired Inspector Michael O'Neill, whom petitioner had listed as his supervisor in his affidavit.

Ms. Debellis stated that the Board of Trustees would be willing to allow petitioner additional time to provide verification but was voting at the request of petitioner's attorney. The Board of Trustees denied the ADR application on a six-to-six vote.

Thereafter, petitioner found additional materials including his Office of Emergency Management World Trade Center identification badge and NYPD records including overtime slips, Daily Activity Reports, and night differential sheets, which purportedly support his forty hours claim and indicate that he was not assigned to the OCID or the South Bronx Initiative but rather TIRS and the Central Bronx Initiative. In an August 8, 2008 letter, petitioner's counsel asked the Board of Trustees to reopen and grant the application based on the newly discovered materials. Petitioner submitted an affidavit stating that NYPD and the City would have overtime records verifying the new materials. Petitioner's counsel was notified by telephone that the matter would not be reopened, whereupon petitioner filed this Article 78 proceeding.

## *II. Conclusions of Law*

A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 738 states that the following questions may be raised in an Article 78 proceeding: "Whether a determination was made in violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed."

Here, the Board of Trustees' determination was arbitrary, capricious, and an abuse of discretion. Administrative agencies have a duty to act in a careful and prudent fashion in assembling their records. *VR Equities v. New York Conciliation and Appeals Board*, 118 A.D.2d 459, 462 (1st Dept. 1986). Yet

the record shows that respondents searched in the wrong place despite information which should have led them in the correct direction. The Board of Trustees' investigators searched OCID and Manhattan South records, then concluded that petitioner did not perform WTC work when they could not find his name. It is unclear why respondents were searching those records and not others. Lieutenant Pope, believed to be the commanding officer of OCID, had no recollection of petitioner. Respondents cite this evidence demonstrating that petitioner did not perform WTC operations with OCID whereas, in fact, it is only evidence that petitioner was not assigned to OCID during this period. Similarly, Sergeant Boughton stated that 48 hours were spent searching Manhattan South detail rosters without explaining why those were the correct rosters to search. Furthermore, the Board of Trustees had information before it which should have guided its search in the correct direction, namely, the Training Initiative at Rodman's Neck. A November 7, 2007 letter from petitioner's counsel directed the search to Rodman's Neck Firing Range records. The Board of Trustees also had in hand the affidavit of Maria Chachere identifying petitioner as a member of OCCB, of which TIRS was a subunit. The Board of Trustees' own search had uncovered information that petitioner was transferred to TIRS or SBI at some point and a log showing that the TIRS assignment ended on October 24, 2001, almost a month and a half after September 11, 2001. Yet investigators did not press the inquiry when they were unable to check any records at either command. In short, the Board of Trustees searched extensively in the wrong places and prematurely abandoned its most promising inquiries.

As a result of searching the wrong records, the Board of Trustees had no evidence contradicting petitioner's claim. In fact, it had no evidence whatsoever of petitioner's whereabouts and activities in the aftermath of September 11, 2001 apart from the affidavits supplied by petitioner. Faced with such incomplete evidence the Board of Trustees had a duty to defer final a determination:

It is precisely because of the severe limitations on the availability of judicial review of determinations made by bodies such as the pension board that such bodies must make a careful and painstaking assessment of all the available evidence and should defer

final determination until they are satisfied that all the evidence has been fully and fairly considered.

*Brady v. City of New York*, 22 N.Y.2d 601, 605 (1968). See also *Kilgus v. Board of Estimate of City of New York*, 308 N.Y. 620, 627 (1955). The Board's decision to deny petitioner's application on June 11, 2008 on the basis of the incomplete evidence before it was arbitrary, capricious, and an abuse of discretion, and the application should be reexamined in the light of all the available evidence.

Petitioner argues that this court should grant him ADR benefits retroactive to April 11, 2007 or forthwith. Where, as here, ADR is denied on a tie vote, a court can only set aside such decision if it concludes that the member is entitled to ADR as a matter of law on the record. See *Matter of Canfora v. Board of Trustees*, 60 N.Y.2d 347, 352. Petitioner argues his ADR application should have been granted based on his Notice of Participation and the Medical Board finding alone on April 11, 2007. However, petitioner misunderstands the WTC Disability Law.

ADR is awarded when a member in city-service becomes physically or mentally incapacitated for city-service, with certain conditions. The incapacitation must be the natural and proximate result of city-service and not the result of the willful negligence of the member. See NYC Admin. Code § 13-252. Administrative Code § 13-252.1, the WTC Disability Law, provides certain members with a presumption that their disability satisfies these conditions, as follows:

Accidental disability retirement; World Trade Center presumption.

1. (a) Notwithstanding any provisions of this code or of any general, special or local law, charter or rule or regulation to the contrary, any condition or impairment of health caused by a qualifying condition or impairment of health resulting in disability to a **member who participated in World Trade Center rescue, recovery or cleanup operations for a minimum of forty hours** shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident not caused by such member's own willful negligence, unless the contrary be proved by competent evidence. [Emphasis added].

This provision outlines conditions under which members can benefit from a presumption that their disability occurred in city-service and was not a result of the member's willful negligence. One of the

conditions which a member must satisfy in order to benefit from the presumption is participation in forty hours of World Trade Center rescue, recovery, or cleanup operations for a minimum of forty hours. Such participation is one of the presumption's *prerequisites*, not one of its benefits. In addition, petitioner must file a statement with the appropriate pension board. NYC Admin. Code § 13-252.1(e) provides as follows: "In order to be eligible for consideration for such presumption, such member must file a written and sworn statement with the member's retirement system on a form provided by such system indicating the dates and locations of employment."

Petitioner argues that by filing a written and sworn request for reclassification, i.e., the Notice of Participation, he established his forty hours of WTC efforts. However, the statement has no such effect under the WTC Disability Law. A "written and sworn statement" is merely a prerequisite for eligibility for "consideration for such presumption." (NYC Admin. Code §13-252.1(e). Another prerequisite is participation in forty hours of rescue, recovery, or cleanup operations at a WTC site, the very issue in contention here.

This interpretation comports with the general, two-step procedure for approval of ADR pensions whereby the Medical Board certifies the member's disability and makes a recommendation as to whether the disability was incurred in city-service, and the Board of Trustees makes its own determination with respect to all non-medical issues. *See Matter of Borenstein v. New York City Empls. Retirement Sys.*, 88 N.Y.2d 756, 760 (1996). NYC Admin. Code §13-168(a) provides that:

The board [of trustees] shall review such certification with respect to any issues **other than the existence or non-existence of physical or mental incapacitation** and shall determine the member's eligibility with respect to any such issues. Upon such certification by the medical board of the member's physical or mental incapacitation and a **determination by the board finding the member otherwise eligible**, such member shall be retired for accident disability effective the date the application is filed or the date immediately following the last date the member was on the payroll, whichever is later. [Emphasis added].

The forty hours requirement is an issue other than the existence or non-existence of physical or mental incapacitation. Therefore, the Board of Trustees must find petitioner eligible on this issue before petitioner may be awarded an ADR pension; the Notice of Participation is not sufficient. Petitioner is not entitled to ADR benefits as a matter of law on the record as it now stands.

In deciding whether an agency's determination was arbitrary, capricious, or an abuse of discretion, courts may consider only evidence adduced before the agency. *Windsor Place Corp. v. State Div. of Housing and Community Renewal* 554 N.Y.S.2d 913, 914 (1st Dept. 1990); *Luisi v. Safir* 691 N.Y.S.2d 449, 451 (1st Dept. 1999). Respondents argue that the court may not consider Petitioner's Exhibit Z, consisting of photocopies of overtime slips, DARS, night differential sheets, and other materials purporting to establish that he in fact worked the forty hours required by the WTC Disability Law. These materials were not before the Board of Trustees when it reached its June 11, 2008 decision to deny petitioner's ADR application. This court has not considered these materials in determining whether petitioner is entitled to ADR as a matter of law. However, the court directs the Board of Trustees to consider all of the evidence, including Exhibit Z, on remand. *See Luisi v. Safir*, 691 N.Y.S.2d 449, 451 (1st Dept. 1999). Accordingly it is

ORDERED and ADJUDGED that the petition of Thomas McGrath is granted to the extent that the determination of respondent the Board of Trustees, dated June 11, 2008, denying petitioner's application for accident disability retirement benefits is annulled, and this matter is remitted for a new hearing on the issues before the Board of Trustees, at which the Board should consider the materials found by petitioner and relevant evidence which is available within the NYPD but was not before the Board.

DATE: June 10, 2009  
New York, NY

ENTER  
**UNFILED JUDGMENT**  
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and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
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141B).

